

IN THE MATTER OF	:	BEFORE THE
T-MOBILE NORTHEAST, LLC	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	Case No. BA 10-030C
:.....		

DECISION AND ORDER

The Howard County Board of Appeals (the “Board”) met on July 28, 2011, September 1, 2011, October 6, 2011 and November 14, 2011, to hear and deliberate the petition of T-Mobile Northeast, LLC, for a conditional use for a Commercial Communications Tower, specifically a 127-foot tall communications tower designed as a silo that is 16-18 feet in diameter, with up to six T-Mobile antennas centered at 120± feet, and equipment compound for T-Mobile and future co-locators. The proposed tower and equipment compound for T-Mobile and future co-locators would be located in an RC-DEO (Rural Conservation -Density Exchange Option) Zoning District. The petition is filed pursuant to Section 131.N.14 of the Howard County Zoning Regulations (the “Zoning Regulations”).

Board members Henry Eagles, Maurice Simpkins, John Lederer and James Howard participated in the hearings. Board member Henry Eagles presided over the hearings and deliberation of the case. Board member James Walsh recused himself from participating in the case. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

The hearing was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the various technical staff reports, the Department of Planning and Zoning's Technical Staff Report dated February 16, 2011, the General Plan for Howard County, the General Plan of Highways, and the conditional use petition and plan were incorporated into the record by reference.

Sean P. Hughes, Esquire, represented the Petitioner. Michael McGarity, Oakleigh Thorne, Hillorie Morrison and Don Chiang testified in support of the petition. Theodore Mariani appeared individually and as a representative of the Concerned Citizens of Western Howard County in opposition to the petition. Lee O. Warfield, III, Frederick Dorsey, Jennifer Noyes and Theodore Mariani testified in opposition to the petition.

As a preliminary matter, on July 28, 2011, the Petitioner submitted a second amended conditional use plan to the Board, shown as Petitioner's Exhibit #1. The second amended plan dated March 3, 2011 outlines a 2,515-square foot land use area for the proposed telecommunications tower, according to General Note 18. Within this area are the mock silo, two equipment compound areas, the driveway and access area off the main driveway, and a small area around the silo. In accordance with Board Rules of Procedure 2.202 (b&c), the Board considered whether or not the amendments made to the plan were substantive in nature. The Board found that the amendments were not substantive in nature and continued with the hearing.

FINDINGS OF FACT

Based upon the testimony and evidence presented at the hearing, the Board makes the following Findings of Fact:

1. The 10.47-acre, irregularly shaped subject property is located in the 4th Election District on the west side of Daisy Road about 4,800 feet north of Jennings Chapel Road. It is referenced as

Tax Map 20, Grid 6, Parcel 61, Lot 4 and is also known as 3200 Daisy Road (the “Property” or the “Fitzgerald Property”). The Property is zoned RC-DEO (“Rural Conservation – Density Exchange Option). The Property is Lot 4 of the Byong Yoo Subdivision, Record Plat 6886.

2. The Property is accessed from Daisy Road via an approximate 800 foot asphalt and gravel driveway. This driveway leads to a dwelling in the northeast portion of the Property. In this same area are several accessory buildings. To the dwelling’s west is a large pond, which lies about 130 feet at its closest point from the rear Property Line.

On the driveway’s south is a large metal accessory building and four sheds near the front of the Property. Behind these sheds are several attached barns with a silo near the central front area. The Technical Staff Report (TSR) estimates the silo to be about 50 feet in height. To the rear of these barns is a large concrete area.

In the Property’s rear are a stream, a 100-year floodplain, and a drainage and utility easement. Most of this area is wooded and the wooded area extends along portions of the north and south property lines. The Property drops in elevation in a westerly direction from the front to the rear.

3. All adjacent properties are similarly zoned RC-DEO. Adjoining the Property driveway on the south side are three lots of the Byong Yoo Subdivision. The three-acre Lot 1 fronts Daisy Road and is improved with a single-family detached dwelling. To the rear of Lot 1, the three-acre Lot 2 is also improved with a single family detached dwelling accessed from the Property’s driveway. Lot 3, a 55± acre lot encumbered by an agricultural preservation easement, adjoins the south, west, and a portion of the east side of the Property. It is improved by a dwelling sited about 260 feet south of the barns on the Property, and several accessory structures, including a barn sited about 150 feet from the barns on the Property. Parcel 122, situated in the Property’s northeast

corner is a one-acre unimproved property.

On the north, extending to Daisy Road, is the adjoining Parcel 128, Preservation Parcel A, an approximately 71-acre preservation parcel of the Warfields Grant subdivision. There is an agricultural building on this lot, to the east of Parcel 122. The residential lots of this subdivision lie to the north of this preservation parcel and front on Spring House Court and Fields Court.

4. Daisy Road has two travel lanes and about 18 feet of paving within a variable width right-of-way. The TSR reports that the estimated sight distance from the existing entrance at Daisy Road is more than 500 feet to the north and south. According to Department of Public Works data, the traffic volume on Daisy Road north of Jennings Chapel Road was 811 average daily trips as of February 1999.

5. The Property is served by private water and sewer, neither of which is required by the use.

6. The Property is designated as "Rural Conservation" on the Policies Map 2000-2020 of the 2000 General Plan. The General Plan Transportation Map depicts Daisy Road as a Major Collector.

7. T-Mobile is proposing to construct and operate an unmanned commercial telecommunications tower located in the central southern sector of the Property. The area of the proposed conditional use site is 2,515-square feet (the "Site"), as depicted on the March 3, 2011 conditional use plan. A 10-foot gravel access driveway off the existing driveway would provide access to the site and be used for parking. The tower would operate continuously and automatically with no employees on site except for maintenance visits occurring once every other month.

T-Mobile is proposing to construct a 127-foot tall mock communications silo (the "silo"). The silo would be constructed in front of an existing barn and about 18 feet south of an existing

silo. T-Mobile's antennas would be centered at 120 feet. Co-locator antennas would be located below.

T-Mobile's ground equipment will be installed on a 10-foot by 20-foot concrete pad within a 25' by 20' compound area enclosed by a six-foot board-on-board fence. It would be located about 10 feet to the silo's south. An adjoining 20' by 20' area on the south side of this is reserved for future co-locators. The T-Mobile compound depicts six proposed T-Mobile antennas and three future antennas.

8. Michael McGarity, a civil engineer, testified and stated that the proposed use would occupy a very small area on the Property. Specifically, the proposed use would utilize 2,515 square feet out of a 10.47-acre/456,073 square foot sized parcel. Mr. McGarity stated that the 127-foot tall silo meets the tower setback requirements imposed by Zoning Regulations. Mr. McGarity noted that the sight distance in both directions from the subject driveway met the County requirements of Section 2.2 of the Howard County Design Manual. Mr. McGarity testified that the compound will be surrounded by a six-foot tall board-on-board fence and that the proposed tower is designed for more than one user. Lastly, Mr. McGarity stated that the Petitioner is proposing to place the antennas flush mounted on the outside of the silo.

9. Oakleigh Thorne, a real estate appraiser, testified that he has conducted studies on the impact of telecommunications towers on property values, including a study for Clearview Estates in Clarksville, Howard County. His studies indicated that telecommunication towers have no impact on area property values.

9. Hillorie Morrison, a consultant for the Petitioner, testified that the proposed use involves not a traditional tall, guyed or lattice tower or even a monopole, instead it involves a much more expensive and creative telecommunications facility structure, disguised as an agricultural silo. Ms.

Morrison stated that the facility would generate a very low number of vehicle trips, a general maintenance visit one time by one vehicle approximately every two months. Also minimal trips would be required for each additional future co-locator at the facility. Ms. Morrison stated that the facility does not produce or involve any material noise, dust, fumes, odors, lighting, vibrations, hazards or other specific physical conditions. It is an unmanned facility that requires no lighting on the tower. Ms. Morrison also testified that there are no buildings taller than fifty (50) feet in the area, no other communication towers and no water tanks within one-half mile of the proposed tower.

10. Don Chiang, a radio frequency engineer, testified to the proposed location for the tower meeting the coverage objectives and needs of T-Mobile and its customers. Mr. Chiang stated that T-Mobile has a need to provide enhanced services to the area of the proposed site and link-up with existing sites in the area. Mr. Chiang further noted that the proposed location would provide a greater degree of reliability to make and receive wireless calls and high speed internet and that the proposed site location and height would meet the needs. Mr. Chiang stated that the alternative site suggested by the opposition would not be suitable to achieve the coverage objectives as it would be 8/10 of a mile away from the "Fitzgerald Property" and too close to an existing site one mile east of the speculative site. Mr. Chiang also testified that the objective is not to put the site closer to where T-Mobile already has coverage.

11. Lee O. Warfield III, testified in opposition to the petition and stated that the proposed tower should be relocated and out of the viewshed of Oakdale, a property listed on the Howard County Historic Site Inventory.

12. Fred Dorsey testified in opposition to the petition and stated the proposed cell tower to be constructed on Daisy Road, which is to be 127 feet high and encased in an 18-foot wide silo in an attempt to blend it into the rural setting, will pose a significant disruption to the view from the Mariani's who own the Oakdale property.

13. Jennifer Noyes testified in opposition to the petition and requested that the Board hold off putting another cell tower in western Howard County. Ms. Noyes expressed her concerns that the proposed cell tower would have negative health effects on her and her children since she lives approximately 330 yards from the proposed cell tower location. Ms. Noyes stated that she would not buy a house near a cell tower.

14. Theodore Mariani testified in opposition to the petition. Mr. Mariani stated that he lives within view of the proposed tower and expressed his concern about the impact the proposed tower would have on his historic Oakdale property. Mr. Mariani maintains that the proposed tower could have been located at a nearby commercial site and still have met T-Mobile's coverage objectives. Mr. Mariani's, home which is eligible for historic designation in the National Register of Historic Places, is located 3,857 feet from the proposed silo.

CONCLUSIONS OF LAW

Based upon the evidence presented to the Board in this case, and upon the Board's review of the evidence, the Board makes the following Conclusions of Law:

A. General Criteria for Conditional Uses (Section 131.B.)

1. Harmony with the General Plan: The Howard County General Plan designates the area in which the Property is located as a Rural Conservation land use. The Petitioner proposes to construct a telecommunications facility on the Property. Because the Rural Conservation Zoning District permits commercial communications towers as a conditional use, the proposed use is not

inconsistent with the goals and objectives of the General Plan. Further, when a local legislature has determined through its comprehensive plan that a certain use is appropriate in a zone by way of special exception (conditional uses in Howard County), the legislature has effectively declared that such uses, if they satisfy the specific requirements of the use, promote the health, safety and general welfare of the community. *See Anderson v. Sawyer*, 23 Md. App 612, 624, 329 A.2d 716 (1974). T-Mobile is proposing a low intensity, passive utility occupying a small portion of the Property. The utility would make infrequent use of the compound. The mock silo, compounds, driveway and parking areas comprise a 2,515-square foot conditional use area, which is only a small portion of the 10.47-acre Property. The silo meets the one-for-one tower setback requirement imposed by the Zoning Regulations Section 128.E.2.a.(1) and exceeds the 30 foot use setback of the RC zoning district. The site will be accessed from Daisy Road via an 800±foot asphalt and gravel driveway. The estimated sight distance from the existing driveway entrance at Daisy Road is more than 500 feet to the north and south and the TSR reasons that sight distance is not an issue in this case owing to the nature of the proposed use generating minimal traffic. The driveway's location appears to have adequate sight distance for infrequent visits to the compound and it appears to be appropriately sized for the use, which will involve infrequent visits by T-Mobile employees, trucks and related equipment. Accordingly, the nature and intensity of the operation, the size of the Property in relation to the use, and the location of the Property with respect to streets giving access to the Property are such that the use will be in harmony with the land uses and policies indicated in the General Plan for the district, in accordance with Section 131.B.1.a.

The proposed conditional use will be combined with the permitted farming and residential uses on the Property, and the overall intensity and scale of uses will be appropriate because the proposed use is passive in nature and the facility takes up a very small percentage of the Property.

As such, the Board concludes that the overall intensity and scale of uses is appropriate given the adequacy of the proposed buffers and setbacks, in accordance with Section 131.B.1.b.

2. Adverse Effect: The Petitioner has met its burden of presenting sufficient evidence establishing that this proposed use will not have adverse effects on vicinal properties above and beyond those ordinarily associated with a commercial communications tower concealed as a mock silo in the RC Zoning District.

Virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in such uses. Thus, the question in the matter before the Board is not whether the proposed use would have adverse effects in an RC zoning district. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects beyond those inherently associated with such a use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md.App. 1, 666 A.2d 1253 (1995).

The proposed communications tower use will not generate inordinate physical conditions such as noise, dust, fumes, odors, lighting, or vibrations. The Petitioner proposes to construct and operate an unmanned commercial communications facility on the site. The Petitioner does not propose any signals or lighting on the tower. The equipment compound will be screened by board-on-board fencing. Visits to the site by maintenance personnel would be infrequent, and any dust or noise associated with these visits would be minimal. Consequently, the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will not

be greater at the Site than it would generally elsewhere in the RC-DEO zone, in accordance with Section 131.B.2.a.

The proposed 127-foot communications tower disguised as a mock silo would be located approximately 148 feet from the south property line, 444 feet from the west property line, 427 feet from the north property line and 310 feet from the Property's southeast corner. The proposed silo meets the one-for-one foot tower setback requirement imposed by the Zoning Regulations Section 128.E.2.a.(1) and exceeds the 30-foot use setback of the RC Zoning District. The southern edge of the equipment compound would be located about 130 feet from the closest structure on an adjacent property, a barn (Lot 3), and more than 250 feet from the closest dwelling on an adjacent parcel (Lot 3). The proposed equipment compound is significantly beyond the 30 foot use setback requirement and will be buffered by distance and a board-on-board fence. The proposed communications tower will be situated adjacent to an existing silo in front of the barns on the Property. While the opposition concern about the visual impact of the proposed mock silo adversely affecting the viewshed from the Oakdale property is understandable, this testimony amounted only to unsupported opinions and conclusions concerning this potential adverse effect. Unsupported conclusions or fears of witnesses to the effect that a proposed use of property will or will not result in harm amount to nothing more than vague and general expressions of opinion which are lacking in probative value. *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974). The Board further comments that because all towers need height to function, the view of the upper section of a commercial communication tower is also an inherent adverse impact of this conditional use. Consequently, the location, nature, and height of structures, walls and fences, and the nature and extent of landscaping on the site are such that the use will not hinder or discourage the use or development of the adjacent land and structures more at the subject site than it would generally

elsewhere in the zone, in compliance with Section 131.B.2.b. of the Zoning Regulations.

The facility would be unmanned and would generate approximately one additional vehicle trip for each provider per month. The gravel driveway and turnaround area will be of adequate size for parking and access for the particular use, and as such, the Board finds that the parking areas will be adequate and is properly located and suitably screened from adjacent properties, as required by Section 131.B.2.c.

The TSR concludes that the existing ingress and egress drive will continue to provide safe access with adequate sight distance. Furthermore, T-Mobile provided a Site Distance Analysis which concluded that the existing line of sight from the subject driveway in both directions met the county requirements of Section 2.2 of the Howard County Design Manual Volume III Roads and Bridges. Given the extremely low intensity of the use of the site, the ingress and egress drive will provide safe access with adequate sight distance, based on actual conditions, as required by Section 131.B.2.d.

B. Conditional Use Criteria for Communication Towers or Antennas (Section 131.N.14.)

1. The Petitioner submitted testimony and evidence prepared by T-Mobile radio frequency engineer Don Chiang, explaining the need for antennae in the area, the height needed and the existing network coverage. The map attached with Petitioner's conditional use plan shows a county zoning map (exhibit #5) with a half-mile and one-mile radius from the site. Given the residential and rural/agricultural character of the subject area, there are no tall buildings, nor are there tall structures such as water tanks or existing towers of sufficient height to serve as antenna support structure and no governmental structures or non-residential zoning districts within reasonable distance of the proposed facility. Hillorie Morrison testified that there are no buildings taller than fifty (50) feet in the area, any other communication towers and no water tanks within one-half mile of the proposed

tower. The Opponents presented no evidence whatsoever to refute her conclusion. Don Chiang testified that the proposed location meets the coverage objectives and needs of T-Mobile and its customers. T-Mobile demonstrated that there was no available location in a non-residential district to locate the proposed facility. Mr. Chiang testified that the commercially zoned property approximately one mile northeast of the proposed location did not appropriately meet the coverage objectives and needs of T-Mobile and its customers. Thus, the speculative location suggested by the opposition for T-Mobile to utilize is not technologically feasible for T-Mobile and its customers. As such, the Board finds that the Petitioner has demonstrated that a diligent effort has been made to locate the proposed communication facility on a government structure or on an existing structure or within a non-residential zoning district, and that due to valid considerations, no appropriate location is available. The Petitioner submitted maps and plots of the area to be served by the proposed mock silo, and has performed the required evaluation of existing buildings taller than 50 feet, and communication towers and water tanks within one-half mile of the proposed tower; as required by Section 131.N.14.b.(1).

2. The proposed mock silo is designed to accommodate additional antennas and related ground equipment for more than one user, in compliance with Section 131.N.14.b.(2).

3. The ground level equipment and tower will be screened from the public street and from the other residentially zoned properties by a six-foot tall board-on-board fence, distance and existing vegetation, in compliance with Section 131.N.14.b.(3).

4. The proposed tower will be grey or off-white, in compliance with Section 131.N.14.b.(4).

5. No signals or lights are to be placed on the proposed communications tower unless required by the Federal Communications Commission or the Federal Aviation Administration, in compliance with Section 131.N.14.b.(5).

6. Should the Petitioner cease using the tower and not transfer it to another carrier, the Petitioner shall remove the tower from the site within one year of the date that the use ceases, in compliance with Section 131.N.14.b.(6).

ORDER

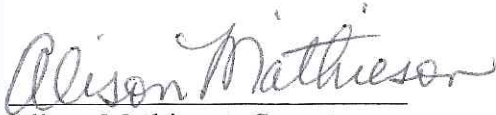
Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 22ND day of March, 2012, by the Howard County Board of Appeals, ORDERED:

That the Petition of T-Mobile Northeast, LLC, for a 127- foot communications facility with equipment compound in an RC-DEO (Rural Conservation: Density Exchange Option Overlay) Zoning District is **GRANTED**, subject to the following conditions:

1. The Conditional Use shall be conducted in conformance with and shall apply only to the proposed 127-foot high communications tower with equipment compound as described in the petition and as depicted on the Conditional Use Plan for the "Fitzgerald Property" dated March 3, 2011 and not to any other activities, uses, or structures on the Property.
2. Proposed antennas are permitted to be installed/mounted on the exterior/outside of the silo.
3. The Petitioner shall comply with all applicable Federal, State and County laws and regulations.

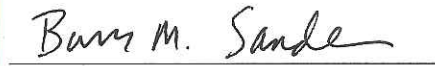
ATTEST:

HOWARD COUNTY BOARD OF APPEALS

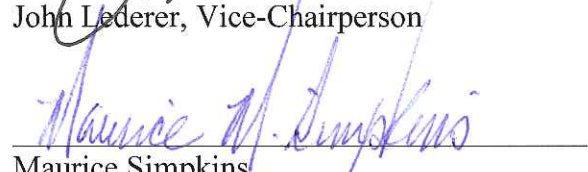

Alison Mathieson, Secretary

Did Not Participate
James Walsh, Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR


Barry M. Sanders
Assistant County Solicitor


John Lederer, Vice-Chairperson


Maurice Simpkins


Henry Eagles


James Howard